313.U.S.595 (7)

Office - Supreme Court, U. S.
FILED
MAY 20 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940.

No. 1071

AMERICAN-WEST AFRICAN LINE, INC.,
(Defendant-Appellant below)
Petitioner,

—against—

JOHN A. LYDECKER, Executor of the Estate of JOHN BERNARD FRYE, deceased,
(Plaintiff-Respondent below)
Respondent.

Petition for Writ of Certiorari to the Supreme Court of New York, New York County and Brief in Support Thereof.

GEO. WHITEFIELD BETTS, JR.,
WILLIAM LOGAN, JR.,
Counsel for Petitioner.

THE COURT PRESS, INC., Law Printers, 120 Cedar St., N. Y. C.

INDEX.

	PAGE
Petition	1
1. Summary and Statement of the Matter Involved	1
2. Jurisdiction	4
3. Questions Sought to be Reviewed Here and the Reasons Why the Writ Should Be Granted	5
Brief	9
I—The Opinions of the Courts Below	9
II—Jurisdiction	9
III—Statement of the Case	9
IV—Specifications of Errors	9
Argument	11
POINT I—There are no facts sustaining the judgment as required under Sections 51 and 59, Title 45 of the United States Code Annotated and the Court erred in refusing to follow the decisions of this Court which hold that a dependent next of kin is not entitled to recover unless there is proof that the deceased left no parents	11
POINT II—The evidence was uncontradicted that the accident was solely the result of the negligence of the decedent	14
POINT III—The verdict was wholly induced by prejudice, improper questions and improper summation on behalf of respondent	17
POINT IV—The prayer of the petitioner should be granted	21

TABLE OF CASES CITED:

PAGE

Atchison Etc. Ry. v. *Saxon*, 284 U. S. 458..... 4

Baesens v. *New York Central Railroad Co.*, 201 App. Div. 191.....6, 18

Bagully v. *Morning Journal Association*, 38 App. Div. 522 .....6, 18

Baltimore & Carolina Line Inc. v. *Redman*, 295 U. S. 654 .....5, 14

Beebe v. *Moormack Gulf Lines*, 59 F. (2d) 319, cert. den. 287 U. S. 597.....5, 13

Boyle v. *Southern R. Co.*, 36 Misc. 289..... 13

Chicago G. W. R. Co. v. *Rambo*, 298 U. S. 99..... 4

Chicago M. & St. P. Ry. v. *Coogan*, 271 U. S. 472..... 5

Cole v. *Mayne*, 122 Fed. 836..... 13

De Luca v. *Shepard Steamship Lines*, 65 F. (2d) 566; opinion modified, 67 F. (2d) 437, cert. den. 291 U. S. 685.....6, 16

Horse Creek Mining Company v. *Frazier's Administrators*, 224 Kentucky 211..... 17

Lawson v. *Nyman*, 258 App. Div. 1032..... 6

Louisville, Evansville & St. Louis Consolidated Railroad Company v. *Lohges*, 6 Indiana Appellate Reports 288..... 13

Maitland v. *Greenberg*, 182 App. Div. 929..... 13

Manigold v. *Black River Traction Co.*, 81 App. Div. 381 18

New Orleans & N. E. R. R. Co. v. *Harris*, 247 U. S. 367 .....5, 13

New York Central v. *Marcone*, 281 U. S. 345..... 16

People v. *Johnson*, 284 N. Y. 182.....6, 19, 20

PAGE

Sabine Towing Co. v. *Brennan*, 85 F. (2d) 478, cert. den. 293 U. S. 611 ..... 5, 12

Stein v. *B'klyn, Q. Co. & Suburban R. R. Co.*, 62 Misc. 309 18

St. Louis v. *Simpson*, 286 U. S. 346 ..... 5, 6, 16

West Kentucky Coal Company v. *Parker's*, 229 Kentucky 685 17

OTHER AUTHORITIES CITED:

Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Sec. 1, 43 Stat. 938 [U. S. C. A. Title 28, Section 347(a)]:
Section 240(a) 4

Lawyers Reports Annotated, 1916 Ed. 160 13

Merchant Marine Act, known as the Jones Act (Title 46, Section 688, U. S. C. A.) Section 33 ..... 2, 5, 9, 12

New York Civil Practice Act:
Sections 445-446 3
Section 549 20

Railway Employers Liability Act, Title 45, United States Code Annotated:
Sections 51 and 59 ..... 3, 4, 5, 9, 11, 12

Tiffany, Death by Wrongful Act, pages 409-412 13

Supreme Court of the United States

October Term, 1940.

No.

AMERICAN-WEST AFRICAN LINE, INC.,
(Defendant-Appellant below)
Petitioner,

—against—

JOHN A. LYDECKER, Executor of the Estate of JOHN BERNARD FRYE, deceased,
(Plaintiff-Respondent below)
Respondent.

Petition for Writ of Certiorari to the Supreme Court of New York, New York County.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, American-West African Line, Inc., respectfully shows to this Honorable Court as follows:

1. Summary and Statement of the Matter Involved.

This is a petition for certiorari brought to obtain a review of a judgment of the Supreme Court of the State of New York, County of New York, entered on the 10th day of January, 1941 affirming a judgment entered on a jury verdict for respondent. The

Court of Appeals in its discretion refused to review the judgment and an order was duly entered to that effect on the 21st day of March, 1941.

The action was brought under Section 33 of the Merchant Marine Act, known as the Jones Act (Title 46, Section 688, U. S. C. A.) on behalf of a dependent niece to recover damages for the death of John Bernard Frye, Chief Officer of petitioner's S. S. *Padnsay* (R., p. 9). The testimony was uncontradicted that Frye was commanding officer in charge of the vessel (the captain being ashore) (R., p. 231) and personally directing and issuing orders for the unloading of the No. 2 hatch at Port Harcourt, West Africa, at the time of the accident (February 6th, 1937). The accident occurred when the jumbo boom, which was being operated under Frye's personal supervision and orders fell at about 9 A. M. and the heel of it crushed him against the No. 1 starboard winch and he died three hours later (Defendant's Exhibit 1).

The evidence was uncontradicted that deceased was directly responsible to petitioner to keep the booms, winches and gear in good condition (R., pp. 187, 188; 236). Even if it is assumed that the conflicting and contradictory testimony of respondent's witnesses, by which respondent tried to prove that the heel of the boom, the winches and gear were defective, is true the complaint should have been dismissed because the evidence was uncontradicted that the duty of keeping such apparatus in repair rested solely on deceased and he failed to fulfill his duty (R., pp. 187, 188; 236). Even one of respondent's witnesses substantiated this (R., p. 126). Before he died, deceased admitted the accident was his fault (R., pp. 191, 249, 262, 396).

Upon the trial, at the close of respondent's case, a motion was made to dismiss the complaint for lack of proof and the court reserved decision on this motion (R., p. 164).

At the close of the entire case this motion was renewed and denied (R., p. 337) and another motion made to dismiss the complaint for lack of proof on all the evidence was denied (R., p. 338).

Petitioner's motion to set aside the verdict was conditionally granted unless the respondent would consent to a reduction of the verdict from $15,000 to $11,500, which he did (R. pp. 23, 24), and the motion to dismiss the complaint for lack of proof after the verdict was denied with an opinion (R., p. 416).

Under Sections 445-446 of the New York Civil Practice Act exceptions to the denial of these motions are deemed taken, nevertheless appropriate exceptions were taken on the trial (R., pp. 164, 338). The trial court's denial of these motions to dismiss the complaint squarely raised the question of the sufficiency of respondent's proof as a matter of law.

Upon appeal it was contended by petitioner that the denial by the trial court of these motions constituted reversible error. It was further urged that the complaint should have been dismissed because the respondent did not allege or prove that the deceased's parents did not survive him as required under Sections 51 and 59, Title 45, United States Code Annotated, which is incorporated in the Jones Act; that the uncontradicted and corroborated evidence conclusively established that the conditions which caused the accident were created solely and proximately by the deceased, which under decisions of this Court barred recovery; and that the verdict was induced by prejudicial questions and summation

which constituted reversible error under the decisions of the courts of the State of New York.

The Appellate Division of the Supreme Court, First Department, affirmed the judgment without an opinion (R., pp. 421, 422) and denied petitioner's motion for leave to appeal to the Court of Appeals (R., pp. 428, 429).

The Court of Appeals in its discretion denied a motion for leave to appeal to that court (R., p. 436).

2. Jurisdiction.

(a) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Sec. 1, 43 Stat. 938 [U. S. C. A. Title 28, Section 347(a)].

(b) The date of the judgment to be reviewed is January 10th, 1941 (R., pp. 422, 423). The order denying petitioner leave to appeal to the Court of Appeals of the State of New York by that Court was entered on March 21st, 1941 (R., pp. 437, 438).

(c) The questions here presented involve the construction of the Railway Employers Liability Act (Secs. 51 and 59, Title 45, U. S. C. A.), the error of the trial court in failing to dismiss the complaint for lack of proof, and improper questions and summation on behalf of respondent.

(d) Cases believed to sustain the jurisdiction of this Court to grant a writ of certiorari in the present case are:

Chicago G. W. R. Co. v. *Rambo,* 298 U. S. 99;
Atchison Etc. Ry. v. *Saxon,* 284 U. S. 458;

Chicago M. & St. P. Ry. v. *Coogan,* 271 U. S. 472;
St. Louis v. *Simpson,* 286 U. S. 346;
Baltimore & Carolina Line Inc. v. *Redman,* 295 U. S. 654.

3. Questions Sought to be Reviewed Here and the Reasons Why the Writ Should be Granted.

The principal question presented on the present application is as follows:

> May a judgment entered on a jury verdict for damages for death in favor of a dependent niece under Sections 51 and 59 of Title 45 of the United States Code Annotated, which is incorporated by reference in the Jones Act, be permitted to stand where the trial court denied motions to dismiss the complaint for lack of proof after plaintiff's case, after the entire case and after the verdict in the absence of allegations or proof that the deceased left no parents surviving him?

The judgment is contrary to the decisions of this Court which hold that the last named beneficiary under the statute can only recover upon proof of the absence of the prior classes of beneficiaries. The rulings on the motions to dismiss the complaint were contrary to the law established in the cases of *New Orleans & N. E. R. R. Co.* v. *Harris,* 247 U. S. 367; *Beebe* v. *Mormack Gulf Lines,* 59 F. (2d) 319, cert. den. 287 U. S. 597; *Sabine Towing Co.* v. *Brennan,* 85 F. (2d) 478, cert. den. 293 U. S. 611.

In addition petitioner presents on this application the question of whether a recovery for respondent can be sustained where the uncontradicted and cor-

roborated evidence established that the accident was solely and proximately caused by the deceased. Petitioner was entitled to a peremptory instruction dismissing the complaint on the authority of *St. Louis* v. *Simpson,* 286 U. S. 346 and *De Luca* v. *Shepard Steamship Lines,* 65 F. (2d) 566; opinion modified, 67 F. (2d) 437, cert. den. 291 U. S. 685.

Petitioner also brings up for review the reversible error of the trial court in failing to grant a motion for a mistrial because of a prejudicial question asked on behalf of respondent; the decision of the trial court being contrary to the law of the State of New York as expressed in *Baesens* v. *New York Central Railroad Co.,* 201 App. Div. 191; *Bagully* v. *Morning Journal Association,* 38 App. Div. 522; *Lawson* v. *Nyman,* 258 App. Div. 1032; *People* v. *Johnson,* 284 N. Y. 182. Improper summation also prejudiced the jury.

The writ of certiorari should be granted because the judgment is patently contrary to the Federal Statutes and the applicable decisions of this Court and the questions involved are of substantial importance for the proper administration of justice.

WHEREFORE, your petitioner respectfully requests that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York, County of New York, commanding said court to certify and send to this Court on a day to be designated, for its review and determination a full and complete transcript of the record of all proceedings in the said Supreme Court of the State of New York, County of New York, had in the within action entitled in that court

John A. Lydecker, Administrator of the Estate of John Bernard Frye, deceased, plaintiff-respondent, against *American-West African Line, Inc., defendant-appellant;* that the judgment of affirmance made and entered in said cause on the 10th day of January, 1941, may be reversed by this Honorable Court and the complaint dismissed and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, New York, N. Y., May 16, 1941.

AMERICAN-WEST AFRICAN LINE, INC.,
Petitioner.

By Geo. Whitefield Betts, Jr.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. The Opinions of the Courts Below.

The only opinion below was that of the trial justice on the denial of the motion to dismiss the complaint after the verdict and the conditional granting of the motion to set aside the verdict (R., pp. 413-416). This opinion is not reported.

II. Jurisdiction.

The grounds on which the jurisdiction of this Court is invoked are stated in the petition.

III. Statement of the Case.

The case history is summarized in the petition.

IV. Specifications of Errors.

Petitioner respectfully submits that the judgment in this case has been entered and affirmed against your petitioner erroneously in the following particulars:

1. Error in refusing to dismiss the complaint and permitting a recovery herein to a dependent niece where there was no allegation or proof that the deceased's parents did not survive him as required under Sections 51 and 59 of Title 45 United States Code Annotated, incorporated in the Jones Act (R., pp. 164, 338, 416).

2. Error in reserving decision on petitioner's motion to dismiss the complaint for lack of proof after respondent's case (R., p. 164).

3. Error in denying motion made to dismiss the complaint for lack of proof after respondent's case, at the conclusion of the entire case (R., p. 337).

4. Error in denying petitioner's motion to dismiss the complaint for lack of proof at the conclusion of the entire case (R., p. 338).

5. Error in denying petitioner's motion to dismiss the complaint for lack of proof and refusing to grant petitioner's motion to set aside the verdict unconditionally after the jury returned its verdict (R., p. 416).

6. Error in failing to set aside the verdict unconditionally because the uncontradicted and corroborated evidence conclusively established that the deceased was in charge of the work and the machinery, and that the conditions which caused the accident were created solely and proximately by him (R., p. 416).

7. Error in refusing to grant a motion for a mistrial because of respondent's prejudicial questions (R., p. 222).

Argument.

POINT I.

There are no facts sustaining the judgment as required under Sections 51 and 59, Title 45 of the United States Code Annotated and the Court erred in refusing to follow the decisions of this Court which hold that a dependent next of kin is not entitled to recover unless there is proof that the deceased left no parents.

The complaint and bill of particulars fail to allege that Frye left no surviving widow or children, nor is it alleged that decedent left no parents. Respondent was requested in Paragraph 28 of petitioner's order for a bill of particulars to

> "State what relatives, heirs at law and next of kin plaintiff's intestate left surviving him at the time of his death, giving their names and addresses" (R., p. 17).

and in his bill of particulars the respondent stated:

> "The plaintiff is not making any claim for other relatives, and hence this question is immaterial to this case" (R., p. 21).

The clear import in this allegation is that he left other relatives who would be entitled to recover under the Statutes, and petitioner has no knowledge that deceased's parents did not survive him.

The record is absolutely barren of any evidence from which even an inference may be drawn that decedent left no mother or father. It is axiomatic that the burden of proof is on the respondent, yet in his answering brief on appeal, page 39, in the

Appellate Division respondent conceded: "There is no proof that the deceased left no parents * * *".

The court correctly charged the jury by reading to it the applicable sections of the Jones Act and Title 45, Section 51, United States Code Annotated, and admonished the jury to be very careful to remember the statutes upon which the action was based (R., pp. 344-346).

The pertinent portion of Title 45, Section 51 of the United States Code Annotated is as follows:

> "Every common carrier by railroad * * * shall be liable in damages * * *, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death * * *"

The clear verbiage of this statute has been consistently held to create three different groups of beneficiaries, each class of which excludes those following.

Sabine Towing Co. v. *Brennan, et al.,* 85 F. (2d) 478, C. C. A., page 484:

> "The statute (Section 1, 45 U. S. C. A. §51) creates three classes of beneficiaries: (1) The surviving widow or husband and children of the employee; (2) the employee's parents; and (3) the dependent next of kin of the employee. Each class excludes those following, in the order named, and nondependent collaterals are not entitled to recover."

This Court has held that under this statute the last named beneficiaries can only recover upon proof of the absence of a prior class of beneficiaries.

New Orleans & N. E. R. R. Co. v. *Harris*, 247 U. S. 367, 372:

> "The act makes the widow sole beneficiary when there is no child and only in the absence of both may parents be considered. The deceased left a widow and although they had lived apart no claim is made that rights and liabilities consequent upon marriage had disappeared under local law. Of course, we do not go beyond the particular facts here disclosed. In the circumstances, proof of the mother's pecuniary loss could not support a recovery."

See also

> *Beebe* v. *Moormack Gulf Lines, Inc.*, 59 F. (2d) 319. Cert. den. 287 U. S. 597.

The foregoing rulings have been enunciated in cases brought under similar statutes patterned on Lord Campbell's Act, as is the Federal Employer's Liability Act, upon which statute this action is founded.

> *Maitland* v. *Greenberg*, 182 App. Div. 929;
> *Boyle* v. *Southern R. Co.*, 36 Misc. 289;
> *Cole* v. *Mayne*, 122 Fed. 836;
> *Louisville, Evansville & St. Louis Consolidated Railroad Company* v. *Lohges*, 6 Indiana Appellate Reports 288;
> Tiffany, Death by Wrongful Act, pages 409-412;
> Lawyers Reports Annotated, 1916 Ed. 160.

The rule of damages is entirely different where a non-dependent mother or father is the beneficiary instead of a dependent niece. The fact that the niece was dependent increased the damages. Such depend-

ency should not preclude non-dependent parents from recovery. In other words, there is no proof in this case that the niece is the proper party entitled to recover damages.

Since the respondent failed to show that Frye was not survived by his parents, a contingency which is prerequisite to recovery by the niece, no recovery was possible under the statute and the decisions. In the absence of proof that Frye was not survived by his parents the jury utterly disregarded the court's charge in finding that the niece was entitled to recover and the trial court erred in refusing to dismiss the complaint, to which exception was duly taken (R., pp. 164, 338) and in refusing to set aside the verdict (R., pp. 413-416).

Respondent's failure to prove a cause of action under the statutes and decisions of this Court is so apparent that this Court would be justified in reversing the judgment for lack of proof on this petition for writ of certiorari. Such lack of proof would warrant a dismissal of the complaint. *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U. S. 654.

POINT II.

The evidence was uncontradicted that the accident was solely the result of the negligence of the decedent.

The testimony of both respondent's and petitioner's witnesses was that Frye had direct charge and supervision of the unloading of the *Padnsay* on the day of the accident (R., pp. 33, 34, 94, 188, 236, 317). The uncontradicted evidence of petitioner's witnesses, and one of respondent's witnesses, was that Frye

was responsible for the proper condition of the tackle for the unloading (R., pp. 126, 188, 236). The uncontradicted testimony of respondent's own witness was that it was Frye's duty as Chief Officer to report any defects in the gear to the Chief Engineer to have them fixed.

> "Q. In case a piece of machinery under the jurisdiction of the chief officer goes wrong, something happens to it, in your experience it is his duty, is it not, to report it to the chief engineer? A. It is his duty to report the defects to the chief engineer, yes, that is customary practice" (R., p. 126).

Even if we assume that the jury disregarded the testimony that Frye made no report of any defects to the Chief Engineer, respondent failed to prove affirmatively that Frye did make such a report which respondent's own witness, Lytle, testified he should have done (R. p. 126). In the absence of testimony that he made such a report the blame for any defective tackle must rest squarely on the deceased. Furthermore, the testimony of petitioner's and one of respondent's witnesses was that it was Frye's duty to put a stopper or wire preventer on the boom prior to the accident to prevent it from falling and that this should have been done (R., pp. 204-205; 245-246; 331; 280; 301-302). Before he died the deceased admitted that the accident was his fault in that he gave an order to shift the gears which was wrong (R., pp. 191, 249, 262; Defendant's Exhibit 1, p. 396).

The law is well established that where a superior officer is responsible for and creates the conditions which result in his death there can be no recovery.

In a case practically on all fours with the present action this Court denied a writ of certiorari from a judgment of the United States Circuit Court of Appeals for the Second Circuit which held that a motion for a directed verdict for defendant should have been granted. *DeLuca* v. *Shepard S. S. Co.*, 65 Fed. (2d) 566; opinion modified, 67 Fed. (2d) 437; cert. denied, 291 U. S. 685.

In a case also brought under the Federal Employers' Liability Act where the facts showed that an engineer was killed as a result of his own negligence this Court in reversing the judgment, *St. Louis* v. *Simpson*, 286 U. S. 346, Judge Cardozo speaking for the court, said at page 350:

> "The facts so summarized are insufficient to relieve the engineer from the sole responsibility for the casualty that resulted in his death. What was said by this court in *Davis* v. *Kennedy*, 266 U. S. 147, might have been written in this case. 'It was the personal duty of the engineer positively to ascertain whether any other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to use a perversion of the statute to allow his representative to recover for an injury due to his failure to act on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.' See also *Unadilla Ry. Co.* v. *Caldine*, 278 U. S. 139; *Frese* v. *Chicago, B. & O. R. Co.*, 263 U. S. 1, 3; *Great Northern Ry. Co.* v. *Wiles*, 240 U. S. 444, 448."

See also

> *New York Central* v. *Marcone*, 281 U. S. 345;

West Kentucky Coal Company v. *Parker's*, 229 Kentucky 685;
Horse Creek Mining Company v. *Frazier's Administrators*, 224 Kentucky 211.

From the foregoing it is respectfully urged that the judgment should be reversed where it appears that the lower court reserved decision on petitioner's motion to dismiss the complaint after respondent's case, to which an exception was taken and in which it was specifically pointed out to the trial court that the facts showed that the accident was solely caused by Frye (R., p. 164). The trial court also erred when it denied this motion and a similar motion made at the conclusion of the evidence (R., pp. 337-338) and erred in failing to set aside the verdict unconditionally on the ground that it was contrary to the law, the facts and the evidence (R., p. 374).

POINT III.

The verdict was wholly induced by prejudice, improper questions and improper summation on behalf of respondent.

On the trial respondent read prejudicial questions from the deposition of Captain Seay, which was in his possession for approximately one and a half years prior to the trial (R., p. 184), the most damaging of which was as follows:

> "Q. And that their lawyers and their advisers profess to think that a couple of thousand dollars would be generous compensation for the life of Mr. Frye?" (R., p. 222).

This was not a question asked in the heat of trial. It was calmly read from a deposition.

When this question was read petitioner immediately moved for a mistrial which was denied and an exception taken (R., p. 222). Thereafter counsel made further statements emphasizing the importance of this implied admission of liability (R., pp. 222-223). Practically identical questions have been held to be a wilful attempt to influence the jury improperly in the courts of New York on the ground that they imply an admission of liability. The damage was not undone by the court's admonition to the jury to disregard the question. *Baesens* v. *New York Central Railroad Co.*, 201 App. Div. 191; *Manigold* v. *Black River Traction Co.*, 81 App. Div. 381; *Stein* v. *B'klyn, Q. Co. & Suburban R. R. Co.*, 62 Misc. 309.

The judgment should also be reversed on the ground of prejudicial summation on the part of respondent's counsel which justified a reversal when he said

> "* * * For pain and suffering of the decedent from the time of injury to the time of death, and substantial verdicts have been sustained by our highest court, the Supreme Court of the United States. on that" (R., p. 342).

and again:

> "If your verdict is too large, the Court can remedy that. If it is too small, nothing can be done about that" (R., p. 343).

This practice has been vigorously condemned where an identical statement was made in summation.

> *Bagully* v. *Morning Journal Assn.*, 38 App. Div. 522.

This was an appeal from a jury verdict in favor of the plaintiff in a libel action. In summing up counsel for the plaintiff stated:

> "To show how juries give verdicts in libel suits, I have here a bound volume of Court of Appeals cases from the library and in the action entitled *Le Huray Sisters* the jury rendered a verdict for the plaintiff for $10,000."

The court immediately stated that such a statement by plaintiff's counsel was improper and should not be made to the jury after which the counsel withdrew his remark about the $10,000 and asked the jury not to consider it. Reversing the judgment and sending the case back for a new trial the Appellate Division, Hatch, *J.*, said, page 523:

> "There was no possible justification for the reference by the counsel for the plaintiff to the case in the Court of Appeals. It is not possible that any attorney can be so carried away in his zeal for the success of his client, or be so blinded in his sense of propriety, as to be unaware of the improper character of such matter. It was intended for no other purpose than to convey to the minds of the jury that in this class of cases the sum awarded as damages was always large."

The Court of Appeals of the State of New York in a recent case unanimously reversed a judgment because of prejudicial questions asked of prospective jurors by the District Attorney in a criminal action, *People* v. *Johnson,* 284 N. Y. 182, Sears, *J.*, saying, page 187:

> "The vice of the statements and questions of the District Attorney lies not primarily in the

> incorrectness of the statement that an appeal to the Court of Appeals is compulsory but in the suggestion that the jury's verdict, if against the defendant, cannot be seriously harmful to him because of the opportunities for review. This suggestion is fundamentally unsound and vitiates the trial. No element of our judicial process must be more carefully protected than the function of the jury. The jury has nothing to do with appeals and applications for clemency. They lie in a wholly different field. The jurors have task enough to find the truth and proclaim it by their determination without regard to ultimate consequences. Nothing can be permitted to weaken the jurors' sense of obligation in the performance of their duties (*Cf. People* v. *Sherwood,* 271 N. Y. 427; *People* v. *Santini,* 221 App. Div. 139, aff. 246 N. Y. 612)."

So, too, in the present case the jury was given an incorrect statement of law when counsel for respondent told it that if its verdict was too large the court could remedy it, but if it was too small nothing could be done about it, to which an objection was duly taken (R., p. 343). See New York Civil Practice Act, Section 549. The jury apparently felt it had *carte blanche* and that an appeal could cut down the size of their sympathetic verdict, but that no court could increase it. The damage was in the utterance and impression created and was just as harmful as the statements in *People* v. *Johnson, supra.* Under the decisions in the foregoing cases it is respectfully submitted that the judgment should have been reversed and a new trial granted at least.

POINT IV.

The prayer of the petitioner should be granted.

Your petitioner respectfully submits that the final determination by this Court of the questions involved is of the utmost importance to the state courts, to counsel and litigants who have recourse to them, and to the public generally.

It is believed that the judgment entered herein represents an erroneous application and an unfortunate misunderstanding of the Federal statutes involved and of the decisions of this Court.

Finally it is submitted that the lack of proof to substantiate the judgment is so apparent that this Court would be justified in reversing the judgment on this petition.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
WILLIAM LOGAN, JR.,
Counsel for Petitioner.

Office - Supreme Court
FILED
MAY 20 194
CHARLES ELMORE CR
OL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1071

AMERICAN-WEST AFRICAN LINE, INC.,
(Defendant-Appellant below)
Petitioner,

—against—

JOHN A. LYDECKER, Executor of the Estate of JOHN BERNARD FRYE, deceased,
(Plaintiff-Respondent below)
Respondent.

Statement as to Jurisdiction.

GEO. WHITEFIELD BETTS, JR.,
WILLIAM LOGAN, JR.,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Statement as to Jurisdiction 1

Exhibit A 9

TABLE OF CASES CITED:

Atchison, Topeka & Sante Fe Ry. v. *Saxon*, 284 U. S. 458 7

Bagully v. *Morning Journal Assn.*, 38 App. Div. 522.. 7

Baltimore & Carolina Line, Inc. v. *Redman*, 295 U. S. 654 ..... 6, 7

Bassens v. *New York Central Railroad Co.*, 201 App. Div. 191 7

Beebe v. *Moormack Gulf Lines, Inc.*, 59 F. (2d) 319, cert. den. 287 U. S. 597 6

Boyle v. *Southern R. Co.*, 36 Misc. 289 6

Chicago, M. & St. P. Ry. v. *Coogan*, 271 U. S. 472 7

Chicago G. W. R. Co. v. *Rambo*, 298 U. S. 99 7

Cole v. *Mayne*, 182 Fed. 836 6

DeLuca v. *Shepard S. S. Co.*, 65 F. (2d) 566; op. mod. 67 F. (2d) 437; cert. den. 291 U. S. 685 6

Horse Creek Mining Company v. *Frazier's Administrators*, 224 Ken. 211 6

Louisville, Evansville & St. Louis Consolidated Railroad Company v. *Lohges*, 6 Indiana Appellate Reports 288 6

Maitland v. *Greenberg*, 182 App. Div. 929 6

Manigold v. *Black River Traction Co.*, 81 App. Div. 381 7

New Orleans & N. E. R. R. Co. v. *Harris*, 247 U. S. 367 6

New York Central v. *Marcone*, 281 U. S. 345 6

PAGE

People v. *Johnson*, 284 N. Y. 182..... 7

Sabine Towing Co. v. *Brennan, et al.*, 85 F. (2d) 478, C. C. A..... 5

St. Louis v. *Simpson*, 286 U. S. 346..... 6, 7

Stein v. *B'klyn, Q. Co. & Suburban R. R. Co.*, 62 Misc. 309 7

West Kentucky Coal Company v. *Parker's*, 229 Ken. 685 6

OTHER AUTHORITIES CITED:

Judicial Code, Section 240(a), as amended by the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938 (U. S. C. A., Title 28, Section 347(a)) 1

Merchant Marine Act of 1920, Title 46, United States Code Annotated, Section 688, commonly known as the "Jones Act", Section 33.....1, 2, 5

New York Civil Practice Act, Sections 445 and 446.. 5

Railroad Employers' Liability Act, Title 45, United States Code Annotated, Sections 51 and 59..1, 2, 3, 5

Rule 12 of the Supreme Court of the United States 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

AMERICAN-WEST AFRICAN LINE, INC.,
(Defendant-Appellant below)
Petitioner,

—against—

JOHN A. LYDECKER, Executor of the Estate of JOHN BERNARD FRYE, deceased,
(Plaintiff-Respondent below)
Respondent.

Statement as to Jurisdiction.

In accordance with Rule 12 of the Supreme Court of the United States, petitioner submits the following as the basis upon which it is contended that this Court has jurisdiction to review the judgment:

(a) The statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, Section 240 (a), as amended by the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938 (U. S. C. A., Title 28, Section 347 (a)).

(b) This action is brought under Section 33 of the Merchant Marine Act of 1920, Title 46, United States Code Annotated, Section 688, commonly known as the "Jones Act" which incorporates by reference the Railroad Employers' Liability Act, Title 45,

United States Code Annotated, Sections 51 and 59, which are as follows:

Section 688, Title 46, U. S. C. A.—Jones Act.

"RECOVERY FOR INJURY TO OR DEATH OF SEAMAN. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, *and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.)" (Italics ours.)

Section 51, Title 45, U. S. C. A.—Railroad Employers' Liability Act.

"LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any

of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, *for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee,* for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, §1, 35 Stat. 65.)" (Italics ours.)

Section 59, Title 45, U. S. C. A.

"SURVIVAL OF RIGHT OF ACTION OF PERSON INJURED. Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, *for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee,* but in such cases there shall be only one recovery for the same injury. (*Apr. 5, 1910, c. 143, §2, 36 Stat. 291.)

* 'Apr. 22, 1908, c. 149, §9;' should be inserted." (Italics ours.)

(c) The date of the judgment of the Supreme Court, New York County, sought to be reviewed herein is January 10th, 1941 (R., pp. 422-423). The order denying petitioner leave to appeal to the Court of Appeals by that Court was entered on March 21st, 1941 (R., pp. 437-438). The date upon which the petition for writ of certiorari is presented is May 19th, 1941.

(d) The action was brought on behalf of a dependent niece to recover damages for the death of John Bernard Frye, Chief Officer of petitioner's S. S. "Padnsay" (R., p. 9).

The complaint and bill of particulars fail to allege that decedent left no surviving widow or children, nor is it alleged that decedent left no parents. Respondent was requested in Paragraph 28 of petitioner's order for a bill of particulars to

> "State what relatives, heirs at law and next of kin plaintiff's intestate left surviving him at the time of his death, giving their names and addresses" (R., p. 17).

and in his bill of particulars the respondent stated:

> "The plaintiff is not making any claim for other relatives, and hence this question is immaterial to this case" (R., p. 21).

The clear import in this allegation is that he left other relatives who would be entitled to recover under the Statutes, and petitioner has no knowledge that deceased's parents did not survive him.

The record is absolutely barren of any evidence from which even an inference may be drawn that

decedent left no mother or father. It is axiomatic that the burden of proof is on the respondent, yet in his answering brief on appeal, page 39, in the Appellate Division respondent conceded: "There is no proof that the deceased left no parents * * *."

After plaintiff's case a motion was made to dismiss the complaint for lack of proof and the court reserved decision on the motion (R., p. 164). This motion was renewed and denied at the end of the entire case and a similar motion to dismiss the complaint for lack of proof on all the evidence was also denied (R., p. 338).

The court correctly charged the jury by reading to it the applicable sections of the Jones Act and Title 45, Section 51, United States Code Annotated, and admonished the jury to be very careful to remember the statutes upon which the action was based (R., pp. 344-346).

A motion was made to dismiss the complaint after the jury's verdict which was denied and the court failed to set aside the verdict unconditionally (R., pp. 374, 416). The Court's opinion on this motion is attached hereto as Exhibit A. Although it is not necessary to take exceptions to the denial of these motions under New York Civil Practice Act, Sections 445, 446, exceptions were taken at the trial (R., pp. 164, 338).

These motions raised the question of the sufficiency of the proof under the Federal Statutes and decisions of this Court. The cases petitioner relies on which hold that the last named beneficiaries under the statute can only recover upon proof of the absence of other classes of beneficiaries are:

Sabine Towing Co. v. *Brennan, et al.*, 85 F. (2d) 478, C. C. A.;

New Orleans & N. E. R. R. Co. v. *Harris,* 247 U. S. 367;
Beebe v. *Moormack Gulf Lines, Inc.,* 59 F. (2d) 319, cert. den. 287 U. S. 597;
Maitland v. *Greenberg,* 182 App. Div. 929;
Boyle v. *Southern R. Co.,* 36 Misc. 289;
Cole v. *Mayne,* 122 Fed. 836;
Louisville, Evansville & St. Louis Consolidated Railroad Company v. *Lohges,* 6 Indiana Appellate Reports 288.

The lack of proof warrants a dismissal of the complaint. *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U. S. 654.

The trial court also erred in failing to dismiss the complaint after plaintiff's case, after the entire case and after the jury rendered its verdict as a matter of law because the uncontradicted and corroborated evidence established that the deceased was responsible to petitioner for the proper condition of the equipment used during the unloading of the vessel, that he failed to report any defect in this equipment to the Chief Engineer, although it was his duty to do so (R., p. 126) and that the accident was the result of his sole negligence. Cases which sustain petitioner's position on this point are:

St. Louis v. *Simpson,* 286 U. S. 346;
DeLuca v. *Shepard S. S. Co.,* 65 F. (2d) 566; op. mod. 67 F. (2d) 437; cert. den. 291 U. S. 685;
New York Central v. *Marcone,* 281 U. S. 345;
West Kentucky Coal Company v. *Parker's,* 229 Ken. 685;
Horse Creek Mining Company v. *Frazier's Administrators,* 224 Ken. 211.

The trial court refused to grant a motion for a mistrial when a question was read on behalf of respondent which was clearly improper as it implied an admission of liability on behalf of the petitioner (R., p. 222). The damage was not undone by the Court's admonition to the jury to disregard the question.

Bassens v. *New York Central Railroad Co.*, 201 App. Div. 191;
Manigold v. *Black River Traction Co.*, 81 App. Div. 381;
Stein v. *B'klyn, Q. Co. & Suburban R. R. Co.*, 62 Misc. 309.

The jury were also prejudiced by respondent's improper summation (R., pp. 342-343) and practice similar to that indulged in on behalf of respondent has been vigorously condemned.

Bagully v. *Morning Journal Assn.*, 38 App. Div. 522;
People v. *Johnson*, 284 N. Y. 182.

(e) This court has jurisdiction to entertain the appeal taken herein.

Chicago G. W. R. Co. v. *Rambo*, 298 U. S. 99;
Atchison, Topeka & Sante Fe Ry. v. *Saxon*, 284 U. S. 458;
Chicago, M. & St. P. Ry. v. *Coogan*, 271 U. S. 472;
St. Louis v. *Simpson*, 286 U. S. 346;
Baltimore & Carolina Line, Inc. v. *Redman*, 295 U. S. 654.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
WILLIAM LOGAN, JR.,
Counsel for Petitioner.

Exhibit A.

Opinion Rendered by the Trial Justice on Petitioner's Motion to Set Aside the Verdict and Dismiss the Complaint, Decided February 26th, 1940 (Not Reported).

Lydecker, adm'r of estate of John Bernard Frye, dec'd v. *American-West African Line, Inc.*—On motion to set aside verdict and to dismiss complaint. Motions disposed of as indicated.

Motion by defendant to set aside verdict and to dismiss complaint, upon which decision was reserved.

Plaintiff recovered a verdict of $15,000 on two causes of action, viz, $7,500 on each cause of action. Defendant moves to set aside the verdict as excessive and against the weight of the evidence and to dismiss the complaint.

Plaintiff's intestate was fatally injured aboard defendant's vessel, due, it is claimed, to the defendant's negligence. He left him surviving a niece of minor age who was wholly and solely dependent upon him for support and maintenance, and the evidence establishes that he contributed the sum of $50 a month for such support and maintenance, and there is also some evidence that at times he gave her fifty cents or a dollar, and occasionally bought her some clothes, although no definite amounts were testified to. The evidence also establishes that decedent's injuries were of a very severe nature and that he consciously suffered excruciating pain and agony for three hours or more before death.

On the question of negligence it is the judgment of this court that an issue was raised for the considera-

tion of the jury and that the facts sufficiently sustain the verdict rendered.

In contending that the verdict is excessive defendant urges that its largeness is the result of prejudice created by plaintiff's counsel in reading from the deposition of Captain Seay a question which defendant claims must have conveyed to the jury the impression that defendant acknowledged liability for the accident, and also that plaintiff's counsel in his summation stated that the United States Supreme Court had sustained an award of substantial damages for pain and suffering and that such remark must have resulted in a like prejudicial effect.

When the question was read defendant moved for a mistrial, which was denied, and the jury instructed to disregard the question. Similarly, upon objection to the mentioned statement in summation, the jury was instructed to disregard the statement, but no motion for mistrial was then made. None the less, if the verdict is the result of prejudice it should be set aside. On the other hand, the rule is well settled that, generally, a court should not disturb a verdict which is plainly perceived to be right and amply sustained by the evidence, even though there may have been, during the course of the trial, a departure from rigid adherence to the prescribed standards of propriety relating to the conduct of counsel, at least in the absence of some definite proof, as distinguished from mere assertion, that the verdict is the result of prejudice (*Fitzgerald* v. *N. Y. Central R. R.*, 215 App. Div. 1). It is realized that counsel, in the heat of trial, may be carried away by an excess of zeal, or inadvertence, but unless his conduct is persistent and continuous and his fault flagrant, it will not justify setting aside the verdict (*Halpern* v.

Nassau Elec. R. R., 16 App. Div. 90, 94). In the *Halpern* case the court said: "We by no means intend to say that every irrelevant or improper comment made by a counsel through inadvertence or excess of zeal would require or justify setting aside a verdict, but in this case the conduct of the counsel was persistent and continuous, and his fault flagrant." Such a situation is not present here.

For the reasons presently stated I am of the opinion that the verdict did not result from prejudice, and is not excessive but is reasonable in amount, except with respect to the first cause of action, *i. e.*, for loss of support and maintenance. As to this I feel it should be reduced to the sum of $4,000, not because the sum of $7,500 awarded is the result of prejudice, but because I am of opinion that the indefinite and prospective damages awarded are too high, even though in this class of cases the amount of indefinite, prospective and contingent damages to be awarded is left to the reasonable discretion of the jury (*Houghkirk* v. *President, &c., Delaware & Hudson Canal Co.*, 92 N. Y. 219, 225; *Countryman* v. *Fonda, J. & G. R. Co.*, 166 N. Y. 201, 209). In the *Houghkirk* case the court said that it is recognized that in this class of cases the damages to the next of kin are necessarily indefinite, prospective and contingent and that "they cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded." And in the *Countryman* case the court said that "it is a question for the jury to determine, in the exercise of a reasonable discretion, what damages the next of kin of the intestate have suffered, if any, considering the situation as proved." * * * "In other words, they are permitted to consider in a reasonable way those prospective and

indefinite damages arising from the death * * *, in addition to the actual money damages as proved."

As stated, the evidence establishes that the dependent niece received from decedent $50 a month, and assuming that he worked during the five years and seven months until the niece attained her majority, the total sum of which she has been deprived would amount to $3,350. As to the additional sums given her by decedent at intervals and money expended in buying her clothes, while no definite amounts were stated, it still is a recoverable item of damage, though in the realm of indefiniteness (*Houghkirk* and *Countryman* cases, *supra*), but there appears to be a sufficient basis for the recovery of damages in some amount (*Bitondo* v. *N. Y. Central R. R.*, 149 N. Y. Supp. 339; see also *Bruckshaw* v. *Chicago R. Co.*, 155 N. W. 273, reversed on other grounds), and I think a verdict of $4,000 is fair and reasonable.

The award of $7,500 for decedent's conscious pain and suffering for over three hours before death is not large but reasonable in amount, and cannot be said to have been the result of prejudice and is consistent with the holding in *St. Louis & Iron Mountain R. R.* v. *Craft* (237 U. S. 648), where the court held that an award of $5,000 for approximately thirty minutes' suffering was not excessive.

The motion to set aside the jury's verdict of $15,000 in favor of plaintiff as excessive is granted, unless the plaintiff stipulates to a reduction of the verdict to the sum of $11,500. The motion to dismiss the complaint is denied.

No. 1071

MAY 29 194
CHARLES ELMORE CR
CLE

Supreme Court of the United States

OCTOBER TERM—1940.

AMERICAN-WEST AFRICAN LINE, INC.,
Petitioner,

against

JOHN A. LYDECKER, as Administrator of the Estate of John Bernard Frye,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SILAS B. AXTELL,
DOMINICK BLASI,
Counsel for Respondent.

ACKERMAN PRESS, Inc., 142 Liberty St., Phones RE ctor 2-5356-7

INDEX.

PAGES

Facts 1

Jurisdiction 6

Reply to Petitioner's Argument 10

CASES CITED.

Arizona v. *Anelich*, 298 U. S. 110 12

Baltimore & Carolina Line Inc. v. *Redman*, 70 Fed. (2) 635, 295 U. S. 654 15

Beebe v. *Moormack Gulf Lines*, 59 F. (2d) 319, cert. den. 287 U. S. 597 11

Brinkmeier v. *Mo. Pac. Rwy. Co.*, 224 U. S. 268 ..... 7, 8

De Luca v. *Shepard Steamship Lines*, 65 F. (2d) 566; opinion modified, 67 F. (2d) 437, cert. den. 291 U. S. 685 12

Honeyman v. *Hannan*, 300 U. S. 14 9

Israel v. *Arthur*, 152 U. S. 355 ..... 7, 8

Luckenbach S. S. Co. v. *Campbell*, 8 Fed. (2) 223 5

Lynch, et al., State Tax Com'rs, of New York v. *People of New York ex rel. Pierson*, 293 U. S. 55 9

Missouri Pacific R. R. Co. v. *Bushey*, 20 S. W. (2) 614 5

New Orleans & N. E. R. R. Co. v. *Harris*, 247 U. S. 367 10

New York Central v. *Marcone*, 281 U. S. 345 13

Panama v. *Johnson*, 289 Fed. 964, 264 U. S. 375 13

Sabine Towing Co. v. *Brennan*, 85 F. (2d) 478, cert. den. 293 U. S. 611 10

Smiley v. *Kansas*, 196 U. S. 447 ..... 7, 8

Socony-Vacuum v. *Smith*, 305 U. S. 424 15

St. Louis v. *Craft*, 237 U. S. 648 ..... 5, 6, 7

St. Louis v. *Simpson*, 286 U. S. 346 13

Warner v. *Goltra*, 293 U. S. 155 12

OTHER AUTHORITIES CITED:

PAGES

Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Sec. 1, 43 Stat. 938 [U. S. C. A. Title 28, Section 347(a)]:
Section 240(a) 6

The Jones Act (Title 46, Section 688, U. S. C. A.):
Section 33 6

Railway Employers Liability Act, Title 45, United State Code Annotated:
Sections 51 and 59 ..... 5, 10

Supreme Court of the United States

OCTOBER TERM—1940.

AMERICAN-WEST AFRICAN LINE, INC.,
Petitioner,

against

JOHN A. LYDECKER, as Administrator of the Estate of John Bernard Frye,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This case does not present any question of the nature which this Court is accustomed to review by certiorari. There is no federal question of substance. The unanimous decisions of the three New York Courts were in accord with earlier decisions of this Court, the New York Courts and the statute under which suit was brought. No question of general interest or large public importance is presented. There are no conflicting decisions on which this Court is called upon to settle a question of law.

This case concerns only the litigants involved.

The Facts.

Frye, a seaman, was a licensed officer, in the employ of petitioner for 8 years and met his death as a result of being jammed between the end of a boom and the mast of the S. S. "Padnsay" at Port Harcourt, Nigeria, British West Africa, on February 6, 1937.

Petitioner's statement improperly and insufficiently describes the condition of the vessel and its gear; and the events of accident, etc., which necessitates a recitation of the proven facts.

At the time of the accident cargo was being discharged from #2 hatch by the use of a steam winch and booms. The heel of the jumbo boom jammed decedent between the end of the boom and the mast.

The evidence satisfactorily established the ship's unseaworthiness, the petitioner's negligence and proof of defective equipment; that the brake band was broken was admitted by Frye's superior officer, the ship's master, Captain Seay (R., 186, 187).

> "Q. Was it taken off?
>
> A. It was broken off.
>
> Q. When was it broken off.
>
> A. I do not recall just when but Mr. Frye reported that a wire had broken the brake band on both the starboard No. 2 winch and the port No. 1 winch" (R., 186).
>
> "Q. The report by Mr. Frye that there were two bands broken by wires?
>
> A. The report was given to me on the way down the coast" (R., 187).

These repairs could and should have been made at Lagos before the vessel arrived at the port where Mr. Frye was injured, but were not (R., 186).. The repairs could also have been made by the chief engineer of the vessel—the officer who witnesses for both sides testified is charged with that duty, not the chief officer, Frye, as asserted by petitioner (R., 124, 125, 290, 309). It was his, the chief engineer's duty to make repairs to machinery and to keep the winches and brakes in order. This was admitted by two of petitioner's witnesses (R., 290 and 309). Captain Seay was superior to the chief engineer and of Frye (R.,

187). The chief engineer, in petitioner's employ for 10 years (R., 233) said:

"Q. As chief engineer of the 'Padnsey' what are your duties?

A. To keep all machinery attached to the vessel in good condition" (R., 234).

"Q. You have general supervision of all machinery and boilers and the engine-room and—

A. Deck machinery.

Q. And there is only one person over you, the captain?

A. Yes" (R., 235).

This testimony destroys petitioner's assertion that Frye was in charge of the machinery and solely responsible for the accident.

The kroo boys and winchmen, who were Frye's fellow servants ran away when the boom began to fall without shutting off the steam or otherwise assisting Frye (R., 318) and this was certainly negligence within the meaning of the Jones Act.

Petitioner claims that decedent ordered the shifting of gears, and argues that this was the sole cause of the accident. Three eye witnesses testified they heard no such order nor did they hear any alleged confession to that effect (R., 40, 69, 85, 320, 321). The 2nd mate, who saw the accident and only 10 feet away from Frye, said the purported confession originated with the captain (R., 320).

"Q. Did you, as a matter of fact, hear Frye give any order to shift gears just before the boom fell?

A. No, sir.

Q. Did he give you any such order within your hearing?

A. No.

Q. You are sure?

A. Yes, sir" (R., 321).

The captain experienced in testifying, on behalf of petitioner in negligence actions (R., 223), had also "interviewed seamen concerning accidents on other occasions" (R., 223). He had been in petitioner's employ for 12 years and was still in its employ when he testified (R., 184), and he admitted Frye "was a careful man" (R. 225), "a good officer in every way" (R., 206).

Frye still alive when he was taken off the vessel (R., 86), was conscious (R., 247, 271) while in hospital, made this request to Captain Seay:

> "I want you to tell my sister to take care of the baby. He spoke of his niece always as the baby" (R., 191).

The award herein made was for this girl, for whom this action was brought.

As to the item of damages the evidence is uncontradicted that decedent was single (R., 399), left surviving this orphaned niece whom he had supported since she was 3 years old and with petitioner's knowledge for at least eight years, the funds for her support having been by an allotment made directly by petitioner from decedent's wages. Checks still in its possession at the time of trial, were sent to the custodians of the child by it (R., 296). Decedent, in addition to the $50.00 monthly allotment, gave the child clothing and spending money (R., 129). She was Frye's sole surviving dependent (R., 7, 130, 131, 399). (During these years he made no allotments to anyone else.)

Frye was 38 years of age (R., 126), and had a life expectancy of 29.62 years. His niece or "baby" as petitioner and all of the ship's crew knew, was an orphan, whose father died before she was born, and whose mother died when she was 3 years old. The contributions were consistently made, as proven by petitioner's checks. He also, at the end of

> "every trip he would buy whatever was needed in the line of clothes, and things of that sort, left money for her" (R., 129).

Decedent was very affectionate and kind to her at all times (R., 142). No other person ever made any claim except her (R., 7, 20, 21). The pleadings as well as the proof exclude the possibility of other dependents including the father and mother (R., 7, 21, 130, 131, 399). She has the undeniable right under the statute to the recovery that has been allowed her, she being

> "the next of kin dependent upon such employee" (Sec. 59, title 45, U. S. C. A.).

She is the decedent's sole surviving dependent (R., 7, 130, 131).

The first pleading made the respondent's claim known to petitioner that decedent

> "at the time of his death left surviving him a niece who was *solely* and *wholly dependent* upon him for support" (R., 7).

Respondent throughout the entire course of the litigation never changed his position. The proof given at the trial was in conformity with the pleadings.

The second cause of action was for conscious pain and suffering. The jury fixed and the Courts affirmed the award of $7,500.00. The decedent suffered excruciating pain and agony for at least three hours after he was injured (R., 86, 247, 271, 395, 396).

The award on this cause of action was made pursuant to Section 59, Title 45, U. S. C. A., and was reasonable in amount.

St. Louis v. Craft, 237 U. S. 648, 661;
Missouri Pacific R. R. Co. v. Bushey, 20 S. W. (2) 614, 618;
Luckenbach S. S. Co. v. Campbell, 8 Fed. (2) 223.

In St. Louis v. Craft (supra) this Court affirmed an award for $5,000.00 where decedent had suffered 30 minutes and in so doing it is to be noted as aforesaid that:

> "It involves only a question of fact and is not open to reconsideration here. Railroad Co. v. Fraloff, 100 U. S. 24, 31; The Justices v. Murray, 9 Wall. 274; Erie R. R. v. Winter, 143 U. S. 60, 75; Herencia v. Guzman, 219 U. S. 44; Southern Railway v. Bennett, 233 U. S. 80. Judgment affirmed."

As petitioner had conceded to this Court that the Trial Court correctly charged the jury, this case then simply involves the failure of petitioner to provide decedent with a seaworthy vessel, proper gear, and petitioner's negligence under the Jones Act (Title 46, Section 688, U. S. C. A.) and Railway Servants' Act. It is to be noted at the outset that on the question involved the Trial Court found:

> "that an issue was raised for the consideration of the jury and that the facts sufficiently sustained the verdict rendered" (R., 413).

Three Courts have fully considered the subject matter and law applicable and all have found in the affirmative. Their conclusion that the evidence was sufficient to sustain the judgment is in harmony with the statutes and decisions on the subject. Nothing more than well settled principles of law to the facts proven is involved.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code (as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; U. S. C. A., Title 28, Section 347 [a]) and seeks by certiorari to review a State Court judgment, but

petitioner has failed to show that jurisdiction may be entertained under the provisions of said act. Petitioner's Statement of Jurisdiction (p. 5) concedes:

> "*The court correctly charged the jury* by reading to it the applicable sections of the Jones Act and Title 45, Section 51, United States Code Annotated, *and admonished the jury to be very careful* to remember the statutes upon which the action was based." (Italics ours.)

There was not raised during the course of the trial, and the record is lacking that the question sought to be reviewed now under Point I of petitioner's brief was presented to the Trial Court and raised by it during the trial. Further we say that there is no statement or evidence in the record that petitioner presented to the Court of Appeals of the State of New York for determination, a federal question and that its decision of the federal question was necessary to the determination of the cause. There is no report of an opinion by any of the Appellate Courts, for no opinion was rendered by them.

As part of its basis for jurisdiction petitioner refers to and quotes a part of one of respondent's briefs in one of the Appellate Courts. The quotation is not only incomplete but the record negates the incomplete and misquoted statement of petitioner, as set forth in its Statement as to Jurisdiction (p. 5). We submit that the record alone should be relied on as the basis for jurisdiction of the petition to this Court.

Petitioner has also endeavored to induce this Court to review proven facts as found by the jury and matters exclusively of state procedure, although it has been consistently held that such questions will not be reviewed:

Smiley v. Kansas, 196 U. S. 447;
Israel v. Arthur, 152 U. S. 355;
Brinkmeier v. Mo. Pac. Rwy. Co., 224 U. S. 268;
St. Louis R. R. Co. v. Craft (supra).

In *Smiley* v. *Kansas,* 196 U. S. 447, at page 453, the rule was stated to be:

> "The verdict of the jury settles all questions of fact. In Missouri, Kansas &c. Ry. Co. v. Haber, 169 U. S. 613, 639, it is said: 'Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226, 242, 246.' "

In *Israel* v. *Arthur,* 152 U. S. 355, at page 362, this Court held:

> "And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a state upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way. Dower v. Richards, 151 U. S. 658, and cases cited. * * * Writ of error dismissed."

And in *Brinkmeier* v. *Mo. Pac. Ry. Co.,* 224 U. S. 268, at page 270, the rule was stated to be:

> "Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the State, it is not subject to review by us. Texas & New Orleans, R. R. Co. v. Miller, 221 U. S. 408, 416.
>
> It also was held that the evidence produced upon the third trial was not sufficient to sustain a recovery under the petition, and error is assigned upon this. As the petition did not state a cause of action under the Safety Appliance Act, but at most a right of recovery at com-

mon law, the ruling upon the sufficiency of the evidence did not involve a Federal question, and so is not open to reexamination in this court.

Finding no error in the record in respect of any Federal right, the judgment must be affirmed."

Petitioner did not present to the Trial Court the argument advanced here. There is lacking in the record the presentation of a federal question for decision to the highest Court of the State. The following authorities indicate that the petition should be denied.

In *Lynch et al., State Tax Com'rs, of New York* v. *People of New York ex rel. Pierson,* 293 U. S. 52, at pages 54, 55, it was held:

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment is rendered could not have been given without deciding it. (Citing cases.)

* * * * * *

As the record fails to show jurisdiction in this Court, the writ of certiorari is dismissed as improvidently granted.

Dismissed."

In *Honeyman* v. *Hanan,* 300 U. S. 14, 18, this Court stated:

"Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was pre-

sented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. Lynch v. New York ex rel. Pierson, 293 U. S. 52, 54, and cases there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record."

Reply to Petitioner's Argument.

The petitioner's assertion that there were no facts to sustain the judgment as required by Sections 51-59, Title 45, U. S., is not supported by the record nor do the cases cited support its argument. An analysis thereof follows:

In the case of New Orleans R. R. Co. v. Harris, 247 U. S. 367, 372, the mother sued, and her complaint contained no reference to his widow who was alive at the time of trial, and had neither remarried nor divorced. There was no child, and the Court (with which we agree), held:

"The act makes the widow sole beneficiary when there is no child and only in the absence of both, may parents be considered."

There is no comparison between the cases. The recovery, this Court said, must be made under the federal act, as was done in our case, not under the state act as the plaintiff in the Harris case tried to do.

In Sabine Towing v. Brennan, 85 Fed. (2) 478, the Fifth Circuit Court of Appeals in a long and detailed opinion after stating at page 481 that "The law is well settled", held at page 484:

> "There is no doubt that the cause of action abated with the death of the mother, who at the time of her son's death was the *sole beneficiary* entitled to recover, to the exclusion of all others." (Italics ours.)

In the case at bar the sole dependent relative appeared and testified (R., 136 to 142). There has therefore been no abatement as there was in Brennan's case.

In Beebe v. Mooremack Gulf Lines, 59 Fed. (2) 319, Harrison H. Knighton, an employee, was survived by a wife, child and mother. A Marion Beebe, with whom some weeks before his death he had gone through a marriage ceremony, claimed damages. The employer had settled the case with the mother, wife and child. Beebe was not recognized, because as the Court said, there can be but one recovery, and that recovery may be only had by the lawful wife, there being but one widow, namely, the first wife. It held in denying Beebe damages:

> "The statute speaks of the surviving widow as though there could be but one. She who was the decedent's lawful wife at the time of his death is his widow. Polygamy is a crime under the laws of the United States. * * *
>
> We feel sure that Congress did not contemplate the possibility of a man leaving two lawful wives, or holding an employer to compensate two women claiming to be such."

Petitioner's contention that Frye, being an officer of the vessel, assumed the risk of the *defective equipment* and that it was not therefore responsible either for the unseaworthiness of the vessel and its equipment or the acts of his fellow crew members and the master is erroneous. The fact is that though Frye was chief mate he was a "sea-

man'' and entitled to all the benefits of laws enacted for their protection. Petitioner's responsibility and duty to him was no less in degree than its duty to the lowest ranking man on the vessel.

Warner v. Goltra, 293 U. S. 155.

It was there held that even the master of the vessel, was a seaman within the meaning of the Jones Act.

In Arizona v. Anelich, 298 U. S. 110, at 123, this Court said:

> ''Its (the Jones Act) purpose was to enlarge that protection, not to narrow it. Cf. Chelentis v. Luckenbach S. S. Co., supra. Its provisions, like others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end, citing cases.''

Concerning the case of DeLuca v. Shepard S. S. Co., 65 Fed. (2) 566, opinion modified, 67 Fed. (2) 437, cert. denied, 291 U. S. 685, on which petitioner places great stress and reliance, there are several important factors that distinguish it from ours. DeLuca was not a seaman, but Frye was. DeLuca's case was a third party action, this was not—this is a case of master and servant, DeLuca's was not. In the DeLuca case the Court found:

> ''There was no defect in the cable furnished by the defendant * * *'' (p. 438).

As pointed out above, Captain Seay admitted the brake band was broken and that it was not repaired. The jury's verdict and the affirmances negate a finding such as was made in DeLuca's case. Petitioner's contention that it was not negligent or that its vessel was without defects is thus satisfactorily refuted. Furthermore DeLuca as a shore worker was free to leave his employment, Frye was not.

Frye was in foreign waters and required to obey the orders of the ship's master.

Panama v. Johnson, 289 Fed. 964. The injured seaman was also in foreign waters. At page 979 it was held:

> "It is the duty of seamen to remain with the ship and to act in obedience to the commands of the master. Disobedience of orders by a seaman may involve him in serious consequences and subject him to possible forfeiture of wages previously earned and to imprisonment by the master. * * *
>
> "A master of a vessel has authority to enforce discipline on his ship and to compel the obedience of seamen and may inflict corporal punishment upon them."

This was the case in which the constitutionality of the Jones Act was argued and sustained (Panama v. Johnson, 264 U. S. 375).

The St. Louis v. Simpson case, 286 U. S. 346, relied upon by petitioner is distinguishable from the case at bar, and is therefore not applicable. It appears the claimant Simpson:

> "rests her right to recover upon what is characterized as the doctrine of 'the last clear chance' " (p. 349).

We did not recover on this ground and have never so claimed. This Court found in the Simpson case that the casualty was due to the decedent's sole negligence. The jury made no such finding in our case. In that case there was no claim of defective equipment or gear. In our case it was proven the brakes were broken and could have been repaired long before Frye was injured, but were not.

New York Central v. Marconi, 281 U. S. 345, is not helpful to petitioner. In affirming a plaintiff's recovery, had by a widow, at page 349 this Court said:

> "We think that there was sufficient evidence of petitioner's negligence to take the case to the jury."

And at page 350:

> "On the evidence it was for the jury to say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether failure to give it was the cause of the death.
>
> The jury, having found, as it might, that the negligence was the cause of the death, might also have inferred that the deceased was guilty of contributory negligence, but the trial judge correctly charged that under the Federal Employers' Liability Act contributory negligence is not a bar to recovery unless it is the sole cause of the injury or death, and may be taken into consideration by the jury in fixing the amount of damage."

No claim has been made in the case at bar that the Court did not properly charge the jury about contributory negligence. In fact, petitioner has admitted that the Trial Court made a correct charge (p. 5, Statement as to Jurisdiction).

This Court very recently defined the rule with regard to the responsibility of owners for the unseaworthiness of their vessels and the comparative negligence, if any, of the injured seaman.

> "We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence rather than that of assumption of risk, to the seaman who makes use of a defective appliances knowing that a safe one is available. The power of the trial judge to guide and instruct the jury

and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury."

Socony-Vacuum v. Smith, 305 U. S. 424, 432.

Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, also relied on by petitioner is not applicable herein.

In that case, the Trial Court reserved its decision on the motion to dismiss the complaint, until after the jury returned its verdict, but the Trial Court in case at bar ruled on petitioner's motions before submitting the issues to the jury, making no reservations (R., 337, 338).

And what is more important in the Redman case, with which this Court agreed, the Circuit Court (70 Fed. [2] 635) made this finding:

> "We have examined the entire record with care and *are convinced that the evidence is insufficient to support the verdict.* * * * When the only testimony for a plaintiff is *contrary to physical facts proven without contradiction,* the verdict for the plaintiff should be set aside" (p. 637). (Italics ours.)

In our case the Trial Court, with which the appellate Courts unanimously agreed, found that "the facts sufficiently sustain the verdict" (R., 413, 421, 428, 436).

It is submitted that, the principles of law applicable herein being settled, that further litigation in this matter is no longer warranted and the petition for a writ of certiorari should be denied.

Dated: May 28, 1941.

Respectfully submitted,

SILAS B. AXTELL,
DOMINICK BLASI,
Counsel for Respondent.